Supreme Court, U.S.
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No. 97-423

In The

Supreme Court of the United States

October Term, 1996

W.H. AVITTS, *et al.*,

Petitioners,

vs.

AMOCO PRODUCTION CO., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMOCO PRODUCTION CO.

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RULE 29.6 STATEMENT

The parent company of Amoco Production Co. is Amoco Company. The nonwholly owned subsidiaries of Amoco Production Co. are as follows:

Energia Del Sur S.A.
East Texas Salt Water Disposal Co.
Gravcap, Inc.
Heat Transfer Research, Incorporated
Sultran Ltd.

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Respondent Amoco Production Company ("Amoco") requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Fifth Circuit Court of Appeals. The Fifth Circuit's opinion is reported at 111 F.3d 30. For the convenience of the Court, all cites to the opinion will be to the opinion attached as Appendix C to the petition.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254 or Sup. Ct. R. 10. The Fifth Circuit's decision reversing the district court's 28 U.S.C. § 1447(c) award of $641,509.46 in attorney fees, expenses and costs (the "largest" section 1447(c) "award in history"), does not conflict with any decision of this Court or another court of appeals, nor does it depart from established and accepted jurisprudence or address an issue of federal law that requires guidance from this Court. Consequently, there is no reason for this Court to review the Fifth Circuit's decision.

STATEMENT OF THE CASE

Amoco respectfully opposes the petition for a writ of certiorari. The petition assails the Fifth Circuit's opinion for holdings never in fact made. For example, contrary to the first "question presented" in the petition, the Fifth Circuit never held that "filing a motion to remand is a mandatory, threshold pre-requisite before one may be entitled to a 28 U.S.C. § 1447(c) award for erroneous removal." (Petition at i). Petitioners reference 111 F.3d at 33-4 as the location of this purported holding. The Fifth Circuit's opinion ends on page 33 of 111 F.3d.

Equally egregious, the petitioners' statement of the case omits numerous facts pertinent to the case's history that were

presented to and considered by the Fifth Circuit, including the fact that the district court previously attempted to use a federal statute to award petitioners $644,141.99 as "attorneys fees."[1] After this award was reversed on appeal, the district court used 28 U.S.C. § 1447(c) to require payment of essentially the same amount to petitioners. These facts, as well as other facts which were presented to the Fifth Circuit but which are not set forth in the petition, are essential for this Court to fairly decide whether the Fifth Circuit's opinion is deserving of review. To enable the Court to make an informed decision, Amoco now provides the Court with those essential facts.

Petitioners originally filed separate suits in Texas state district court against Amoco seeking money damages for alleged injuries to their property. 1-15 Supp. R.[2] In each case, petitioners asserted that "[i]t is expected that the evidence will reflect that the damages caused by the Defendant are in violation of not only State, but also Federal law." 1-15 Supp R.; 1 R. 6. Amoco removed each of the cases on federal question grounds. *Id.* In the notices of removal, Amoco noted that although petitioners alleged that Amoco violated "Federal laws" in conducting Amoco's oil and gas operations, petitioners did not specify "*which* Federal laws." 1 R. 9; 1-15 Supp. R. (Emphasis in original). At the time of removal, Amoco filed a motion for more definite statement in which it sought clarification of petitioners' federal claims. 1 R. 23. After consolidating the separately filed suits, the district court "summarily denied" Amoco's motion and

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1. *Avitts v. Amoco Prod. Co.*, 840 F. Supp. 1116 (S.D. Tex. 1994), *vacated*, 53 F.3d 690 (5th Cir. 1995).

2. Record references will generally be given by volume followed by page number. "Supp. R." refers to the fifteen separate volumes containing the original petitions, notices of removal and motions for more definite statements. Exhibits are separately contained in unnumbered but labelled redwelds.

recommended that Amoco submit written discovery on the issue. 2 R. 206; 9 R. 2647. Complying with the district court's recommendation, Amoco served petitioners with written discovery which included the following question:

> Please identify, specifically and in detail, each and every statute on which you rely in this lawsuit.

9 R. 2620. Petitioners answered by specifying four federal statutes. 9 R. 2620.

After removal, petitioners amended their pleadings on several occasions; in their third amended complaint, petitioners added Apache Corporation ("Apache") and MW Petroleum Corporation ("MW") as defendants and dropped references to federal law. However, petitioners asserted federal jurisdiction in each of their amended complaints. App. at 16.

In a pretrial order, Amoco questioned the district court's jurisdiction. 8 R. 2131. Petitioners responded that the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. 8 R. 2031. To resolve this issue, the magistrate directed Amoco to file a motion to dismiss, which Amoco did. 7 R. 1749-1736. Petitioners opposed the motion to dismiss. 7 R. 1764-1750. The district court denied the motion to dismiss, which it treated as a motion to remand, characterizing it as a "meritless challenge," and the trial proceeded as scheduled. 7 R. 1793-1791; 8 R. 2037.

In the midst of trial, before allowing Amoco to present any evidence, the district court halted the proceeding and, on its own motion, issued a mandatory injunction requiring Amoco, Apache and MW to conduct an additional environmental study of the property in issue. 8 R. 2050-2041. The district court also

awarded petitioners $644,141.99 in interim attorney fees and expenses, basing the award on the federal Oil Pollution Act of 1990, 33 U.S.C. § 2701-2761 (1988 and Supp. II) ("OPA"). *Avitts v. Amoco Prod. Co.*, 840 F. Supp. at 1127.[3]

Amoco's appeals from the interim fee award and injunction were consolidated by the Fifth Circuit. *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 692 (5th Cir. 1995). A few days before argument, the Fifth Circuit, not petitioners, raised the issue of subject matter jurisdiction. Following oral argument, the Fifth Circuit held that "[t]he district court lacked subject matter jurisdiction over this action and was therefore without authority to enter its orders." *Id.* at 694. The Fifth Circuit vacated the district court's interim fee order and injunction with instructions to remand the case to the state court. *Id.*; 9 R. 2509-2493. Each party was ordered to "bear its own costs." 9 R. 2509.

After the case was remanded to the district court, petitioners filed a Motion for Just Costs And Actual Expenses, Including Attorney's Fees Pursuant to 28 U.S.C. § 1447(c), seeking all attorney fees and expenses incurred by petitioners from the beginning of the lawsuit. 9 R. 2481-2338. Amoco opposed the motion. 9 R. 2650-2510. By order entered June 29, 1995, the district court granted petitioners' motion and awarded petitioners $641,509.46 in costs and attorney fees. 9 R. 2654-2651. The district court sought to justify this award by stating that "a reading of the plain language of the Original Complaint clearly shows that each and every one of Plaintiff's counts were stated in terms of state common law claims." *Id.* (This statement cannot be reconciled either with the district court's decision the previous

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3. The court appointed independent expert later concluded that there were "no currently known environmental problems" in the subject oil field that are the result of oil and gas operations and that "Amoco is believed to have operated the [field] in a prudent manner using operating practices that meet industry and regulatory standards." 9 R. 220.

year to predicate an interim award of attorney's fees on a federal statute — the OPA — or its previous characterization of Amoco's motion to dismiss as a "meritless challenge.") The district court assessed the section 1447(c) award against Apache and MW as well as Amoco, even though neither Apache nor MW had removed the case, and were not parties when the case was removed. 9 R. 2654.

Amoco appealed the section 1447(c) award as did Apache and MW. The Fifth Circuit, after hearing oral argument, held that the district court abused its discretion in awarding petitioners fees and costs under section 1447(c). App. at 22.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The petition contains several misstatements that are material to this Court's determination of whether this case is worthy of review.

The Fifth Circuit ***never*** held that filing a motion to remand is a mandatory, threshold prerequisite to recovery of a section 1447(c) award. (Petition at i, 4, 8, 12). The Fifth Circuit held instead as follows:

> Given the active role appellees [petitioners] took in persuading the district court to retain jurisdiction of the case, fees are not appropriate. Appellees alleged violations of both state and federal law in their original state court complaint; did not move to remand; alleged that the district court had federal question jurisdiction in each amended complaint; opposed the defendants' motion to dismiss for lack of jurisdiction, and

> persuaded the court it had jurisdiction to hear the case.

App. at 21-22.

Similarly, the Fifth Circuit ***never*** held that in all cases, a section 1447(c) award is limited to costs, fees and expenses directly incurred in challenging removal. (Petition at i). Instead, the Fifth Circuit's interpretation of section 1447(c) is shown by the following passage:

> We interpret this language [section 1447(c)'s] "incurred as a result of removal" to limit the litigation expenses that may be awarded under this section to fees and costs incurred in federal court that would not have been incurred had the case remained in state court. . . . We conclude therefore that a party's costs of opposing removal, seeking remand, and other expenses incurred because of the improper removal may be awarded. By contrast, ordinary litigation expenses that would have been incurred had the action remained in state court are not recoverable because such expenses are not incurred "as a result of removal."

App. at 19.

In addition, the Fifth Circuit in *Avitts I* (the consolidated appeal from the interim fee award made under OPA and mandatory injunction) did not instruct petitioners to seek an award of costs, fees and expenses under section 1447(c). (Petition at 3). The Fifth Circuit's last sentence in *Avitts I* is as follows:

> The orders of the district court are vacated, and this matter is remanded to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c).

App. at 9.

In fact, the Fifth Circuit denied the motion for bill of costs filed by petitioners following the Fifth Circuit's determination that the district court lacked jurisdiction to enter the fee award and injunction.

REASONS FOR DENYING THE PETITION

When the Fifth Circuit's actual holdings are examined in the context of a complete and accurate history of this case the unworthiness of this case for review by writ of certiorari is readily apparent.

I.

PETITIONERS' CONFLICT CLAIMS ARE UNTENABLE.

Petitioners assert that *Avitts III* [4] is in "grave conflict" with section 1447(c) and with opinions from this Court, the Second, Third and Sixth Circuits and a Wisconsin District Court. (Petition at 8-9, 11-12). This assertion cannot withstand scrutiny.

Petitioners first argue that the Fifth Circuit held that a plaintiff must file a motion to remand as a prerequisite to a

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4. *Avitts II* is the district court's order awarding the petitioners section 1447(c) fees, costs and expenses. (Petition at 1).

section 1447(c) award and that this holding conflicts with the wording of section 1447(c) and *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992). (Petition at 8). Because the Fifth Circuit never held that a remand motion is a prerequisite to a section 1447(c) award, the Court need not linger long over this argument. Indeed, the Fifth Circuit merely noted petitioners' failure to file a motion to remand as one of *several* factors militating against a section 1447(c) award. App. at 21-22.

Petitioners then argue that the Fifth Circuit's decision conflicts with *Morgan*, 971 F.2d at 920 and *Mints v. Educational Testing Service*, 99 F.3d 1253, 1258 (3d Cir. 1996) because the Fifth Circuit held that a section 1447(c) award is limited to those fees and costs that would not have been incurred had the case remained in state court. In making this argument, petitioners suggest that the *Morgan* and *Mints* courts allowed the plaintiffs' section 1447(c) awards to include recovery of expenses that would have been incurred in state court had there not been a removal. This suggestion is incorrect.

Morgan involved highly "unusual circumstances" in which the defendant removed the case to federal court on the ground that it was a "foreign state" and successfully defeated a motion to remand. *Morgan*, 911 F.2d at 918. Several years later, after a bench trial on the merits, the district court entered judgment against the defendant in the amount of approximately $46 million, and on appeal, in response to questions posed by the appellate court during oral argument, the defendant reversed its position and asserted that there was no federal jurisdiction because it was not a foreign state. *Id.* at 919. The appellate court directed supplemental briefing on the jurisdictional issue and eventually decided that the case should be remanded to state court because of a lack of federal court jurisdiction. *Id.* at 919-20.

Under these "unusual circumstances," the district court awarded costs and attorney fees in the amount of $136,000 and the appellate court affirmed this award. *Id.* at 925. However, contrary to petitioners' implication, the district court limited the award to fees "relating to the foreign state and jurisdictional issues addressed in the supplemental briefings on appeal," expenses that would not have been incurred had the case remained in state court. *Id.* at 920. There simply is no conflict between *Morgan* and the Fifth Circuit's opinion in this case.[5]

Petitioners next argue that there is a conflict between the Fifth Circuit's decision and *Mints v. Educational Testing Service* because, according to petitioners, *Mints* held that a district court may award section 1447(c) fees and costs unrelated to removal and remand. (Petition at 8-9). First, even if *Mints* had held that costs unrelated to remand and removal are recoverable, such holding would not be in conflict with the decision in this case. The Fifth Circuit did not hold that costs and fees unrelated to removal could never be recovered; it only held that costs and fees that would have been incurred in state court should not be recoverable. App. at 19-20. The Fifth Circuit's holding is supported both by the statute and sound reasoning. Whether petitioners prosecuted their claims in state or federal court they would have incurred expert costs, court reporter fees and discovery expenses. To allow petitioners to recover those fees and expenses under section 1447(c) would turn the statute into a fee shifting device. It would effectively eliminate the phrase

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5. Petitioners attempt to support their argument with a partial quote from the *Morgan* dissent that omits crucial language and is taken out of context. (Petition at 8). When the full statement is read in its proper context it is clear that the dissenting judge was concerned with the size of the award. One can only imagine how he would react to the award made by the district court in this case, which petitioners concede is the "largest section" 1447(c) award "in history" and is almost four times the amount of the award in *Morgan*.

"incurred as a result of removal" from section 1447(c). Until the district court entered its award in this case, no court had so interpreted this statute.

Second, *Mints* did not hold that costs unrelated to removal and remand are recoverable. The threshold issue addressed in *Mints*, and the issue which predominates the Third Circuit's opinion, is whether the district court retained jurisdiction to consider a motion for section 1447(c) fees and costs filed after the remand order was signed and the clerk of the court mailed a copy of the remand order to the state court divesting the federal court of jurisdiction. *Mints*, 99 F.3d at 1257-1260. The Third Circuit held that the motion was timely. *Id.* at 1258-1259. In reaching that decision, the Third Circuit noted that a district court may remand a case on its own motion, without notice to the parties. In such a situation, neither presented by *Mints* or the present appeal, the Third Circuit observed that a plaintiff would be deprived of any opportunity to seek appropriate fees and costs if the section 1447(c) award were required to be included in the order for remand. *Id.* It is in that context that the Third Circuit commented almost parenthetically, and certainly in *dicta*, that costs and fees recoverable under section 1447(c) "could include ***items*** distinct from those incurred on a motion to remand." *Id.* at 1259 (emphasis added). In short, there is no conflict between *Avitts III* and *Mints v. Educational Testing Service*.

Also without merit is petitioners' argument that the Fifth Circuit's focus on the non-removing party's conduct in determining the propriety of section 1447(c) award conflicts with *Ahearn v. Charter Township*, 100 F.3d 451, 453 (6th Cir. 1996) and other cases which have held that a removing defendant bears the burden of establishing federal jurisdiction. (Petition at 9). Once again, the alleged conflict is nonexistent. *Ahearn*, which is not a section 1447(c) case, stands for the unremarkable

proposition that a removing defendant bears the burden of establishing federal subject-matter jurisdiction. *Ahearn*, 100 F.3d at 453-454. Amoco has no quarrel with that precept. Although the removing party must establish the propriety of federal jurisdiction, its failure to satisfy that burden when tested by a motion to remand, as occurred in *Ahearn*, does not automatically require the district court to make a section 1447(c) award. App. at 19.

Instead, in deciding whether a section 1447(c) award is appropriate, the courts have consistently considered whether the defendant's removal was reasonable in light of the circumstances. *See Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993); *Howard Griggs Trucking, Inc. v. American Cent. Ins. Co.*, 894 F. Supp. 1503, 1510 (M.D. Ala. 1995) ("[T]he court declines to award costs and attorney fees when from aught that appears, the defendants in this action acted reasonably on the basis of the information available at the time of removal"); *Kluksdahl v. Muro Pharm., Inc.*, 886 F. Supp. 535, 540 (E.D. Va. 1995) (denying request for section 1447(c) fees and costs because notwithstanding that motion to remand was granted, defendant's "attempt to remove certainly was a legitimate one grounded in respectable legal authority"); *Rivers v. International Matex Tank Terminal*, 864 F. Supp. 556, 561 (E.D. La. 1994). Petitioners claim that the "trend among the circuits" is to make an award under section 1447(c) without reference to a defendant's particular state of mind (Petition at 6-7), but such claim is refuted by their own authorities. *See, e.g., Morris v. Bridgestone Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993) (an award of fees and costs under section 1447(c) "should be affirmed if 'fair and equitable under all the circumstances' "); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 448 (9th Cir. 1992) (defendant's intent was considered in deciding whether district court abused its discretion in awarding fees and costs under section 1447(c)).

Plainly put, the requirement that a removing defendant bear the burden of proving federal jurisdiction does not preclude a court from considering the reasonableness of the defendant's belief that federal jurisdiction existed in determining whether to award section 1447(c) fees, costs and expenses. The two concepts peacefully co-exist.

With respect to petitioners' argument that the supposed "conflict" in the circuit courts' opinions have created confusion about the reach of section 1447(c), the only parties that are confused about the reach of section 1447(c) appear to be petitioners. As demonstrated above, the circuit courts have had no difficulty in deciding the appropriateness of section 1447(c) awards. Guidance by this Court is thus unnecessary.

Equally untenable is petitioners' claim that the Fifth Circuit's decision is in conflict with this Court's statutory construction opinions. (Petition at 11-12). Petitioners selectively quote from *Demarest v. Manspeaker*, 498 U.S. 184 (1991), which addressed whether 28 U.S.C. § 1821 required payment of witness fees to a convicted state prisoner who testified at a federal trial pursuant to a writ of habeas corpus. Unlike section 1447(c), section 1821 does not confer any discretion on the district court, but provides that a witness in attendance at any court of the United States "shall" be paid fees. Given this fundamental difference between sections 1821 and 1447(c), it is peculiar that petitioners rely on it as a basis for a conflict.

Petitioners lastly argue that the Fifth Circuit's holding is in conflict with the "plain" wording of section 1447(c) because Congress did not require courts to consider a "plaintiff's post-removal conduct in deciding whether to award fees." (Petition at 11-12).[6] The flaw in this argument is that although section

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6. The Fifth Circuit's holding that petitioners are estopped to recover under section 1447(c) is an independent basis for its decision.

1447(c) may not require a court to consider a "plaintiff's post-removal conduct in deciding whether to award fees," it certainly does not prohibit a court from considering such conduct. The facts in this case (facts that were not disputed by petitioners), demonstrate that the petitioners bear a substantial share of the responsibility for this case remaining in federal court. There is nothing in section 1447(c) that prohibits the courts from taking these facts into consideration in determining whether an award of fees and costs is appropriate.

II.

THE FIFTH CIRCUIT DID NOT SUBSTITUTE ITS DISCRETION.

The issue before the Fifth Circuit was whether the district court abused its discretion in awarding petitioners $641,509.46 pursuant to section 1447(c). App. at 18, 19, 22; *see also Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 372 n.14 (5th Cir. 1995) (trial court's decision to award section 1447(c) fees and costs is reviewed for an abuse of discretion); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d at 445 (same).

Petitioners' argument that the Fifth Circuit substituted its discretion for that of the district court is flatly refuted by the Fifth Circuit's opinion. The Fifth Circuit did precisely what it has jurisdiction to do: it decided, based on the record submitted to it, that the district court abused its discretion in awarding petitioners $641,509.46 under section 1447(c). App. at 22.

III.

THE FIFTH CIRCUIT DID NOT VIOLATE THE LAW OF THE CASE DOCTRINE.

Juxtaposing snippets of sentences from the Fifth Circuit's decision in *Avitts I* and *Avitts III*, and confusing two distinct

legal inquiries, petitioners argue that the Fifth Circuit violated the law of the case doctrine. (Petition at 14-15). Petitioners' argument is insupportable.

First, law of the case only applies to legal holdings. The case relied upon by petitioners so holds. *Anderegg v. High Standard, Inc.*, 825 F.2d 77, 80 (5th Cir. 1987). The phrases and passages petitioners have excerpted from *Avitts I* are not legal holdings and therefore do not implicate the law of the case doctrine. *Anderegg*, 825 F.2d at 80. Also, the legal concepts at issue in *Avitts III* differed from those at issue in *Avitts I*. App. at 19 ("The determination of whether Amoco's removal of this case was legally improper was decided in the earlier appeal and is not before us. . . . We still must determine whether under the circumstances of this case the district court abused its discretion by ordering Amoco to pay $641,509.46 in costs and fees.").

Second, petitioners misquote the Fifth Circuit. In *Avitts III*, Amoco asked the Fifth Circuit to review whether the district court abused its discretion in awarding section 1447(c) fees and costs. In recounting the case's procedural history, the Fifth Circuit stated as follows:

> In their state court complaints, appellees alleged that their damages caused by Amoco were in violation of "not only State law but also Federal Law." Based on federal question jurisdiction, Amoco removed the case to federal court in October 1990. The district court then consolidated appellees' suits.

App. at 15-16. The Fifth Circuit did not, as petitioners' clever editing of the Fifth Circuit's opinion erroneously suggests, change its view of the well-pleaded complaint rule.

IV.

THE FIFTH CIRCUIT DID NOT FIND FACTS.

The Fifth Circuit did not improperly resolve disputed facts. In holding that the district court abused its discretion in awarding petitioners $641,509 in fees, costs and expenses, the Fifth Circuit cited the following considerations: petitioners alleged a violation of federal law in their original state court complaints; petitioners did not move to remand; petitioners alleged that the district court had federal question jurisdiction in each amended complaint; petitioners opposed the defendants' motion to dismiss; and petitioners persuaded the district court it had jurisdiction to hear the case. *Id.* Petitioners have never disputed any of these facts.

V.

THE FIFTH CIRCUIT BASED ITS HOLDING ON ARGUMENTS PRESENTED BY THE LITIGANTS.

Amoco's appellant's brief identified the issue before the court as follows:

Did the district court abuse its discretion in awarding plaintiffs **$641,509.46** in attorney fees and costs pursuant to 28 U.S.C. § 1447(c) when:

1. Plaintiffs never requested that the case be remanded;

2. Plaintiffs vigorously *opposed* Amoco's pretrial efforts to return the case to state court;

3. The district court denied Amoco's pretrial motion to dismiss which raised the issue of the district court's lack of subject matter jurisdiction;

4. The district court awarded interim relief based on a federal statute (which relief was predicated on an erroneous application of the federal statute, as evidenced by this Court's subsequent determination that the district court lacked subject matter jurisdiction); and

5. More than 95% of the award represents fees and expenses *un*related to the removal or to the remand?

Nonetheless, petitioners claim that Amoco did not argue that petitioners were "estopped" to recover a section 1447(c) award. The above demonstrates that Amoco's argument was precisely that petitioners' own conduct and the rulings made by the district court made a section 1447(c) award unfair. Petitioners' argument that the Fifth Circuit's holding is premised on an argument not advanced by Amoco because Amoco did not use the word "estoppel" is beyond elevating form over substance; it is simply fanciful.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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